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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 73-5109

CLAYTON SPIERS, SR.,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

PETITION NOT PRINTED

ROBERT E. KENDRICK
Deputy Attorney General
State of Tennessee
215 Supreme Court Building
Nashville, Tennessee 37219

WILLIAM C. KOCH, JR.
Assistant Attorney General
State of Tennessee
414 Supreme Court Building
Nashville, Tennessee 37219

OF COUNSEL:

DAVID M. PACK
Attorney General
State of Tennessee

NESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202
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STATEMENT OF THE CASE

The Petitioner was indicted by the Madison County, Tennessee grand jury at its May, 1971 term charging him and two others with obtaining money by false pretenses, larceny, and larceny by trick. Upon the Petitioner's plea of not guilty, trial commenced on January 5, 1972 and continued to January 7, 1972 when, after due deliberation, the jury found the Petitioner guilty on all three counts of the indictment and fixed his punishment at not more than five (5) years in the State Penitentiary.

The Petitioner perfected an appeal to the Tennessee Court of Criminal Appeals. On January 9, 1973, that Court, in a unanimous opinion written by Judge Charles Galbreath, affirmed the Petitioner's conviction. Subsequently, on April 16, 1973 the Supreme Court of Tennessee denied the Petitioner's petition for a writ of certiorari without a written opinion. Thereupon, in an order filed April 25, 1973, Judge Charles Galbreath allowed the Petitioner to remain on bond pending the filing of his petition for a writ of certiorari in the United States Supreme Court.

QUESTIONS PRESENTED

I.

Whether the admission into evidence of a pre-indictment line up identification by the prosecuting witness wherein the Petitioner did not knowingly and intelligently waive his right to counsel and wherein he was promised that he could make bond only after he participated in the line up violates the Sixth and Fourteenth Amendments to the Constitution of the United States.

II.

Whether the determination of the voluntariness of the Petitioner's waiver of counsel at the lineup by the jury, rather than the trial court, is a denial of due process under the Fourteenth Amendment of the Constitution of the United States.

REASONS FOR DENYING THE WRIT

The issues raised by the Petitioner are wholly unsupported by the record. Before Mr. Fred Roberts, the prosecuting witness, was allowed to testify concerning his identification of the Petitioner at a lineup held two days

after the crime took place, the trial court, out of the presence of the jury, heard evidence of the circumstances surrounding the line up. This evidence consisted of the testimony of the prosecuting witness, the Petitioner himself, and the two police officers who conducted the line up. See Appendix A. During the course of this hearing, the State introduced a document showing that the Petitioner waived his right to have an attorney present while the line up was conducted. After hearing the testimony of all those who were present at the line up, the trial court overruled the Petitioner's motion to strike the prosecuting witness's identification of the Petitioner at the line up and allowed the jury to hear testimony concerning this identification.

As a result of this Court's decision in *Kirby v. Illinois*, 406 U.S. 682 (1972), the courts of Tennessee have narrowed the pre-Kirby decision of *Greer v. State*, 1 Tenn. Crim. App. 407, 443 S.W. 2d 681 (1969) and on at least two occasions have held that the per se exclusionary rule of *United States v. Wade*, 388 U.S. 218 (1967) and *Gilbert v. California*, 388 U.S. 263 (1967) does not apply to pre-indictment confrontations. *Russell v. State*, ___ Tenn. Crim. App. ___, 489 S.W. 2d 535, 537 (1972) and *Bracken v. State*, ___ Tenn. Crim. App. ___, 489 S.W. 2d 261, 262 (1972). See also *Mock v. Rose*, 352 F. Supp. 554 (E.D. Tenn. 1971). Thus, the law in Tennessee, as it is elsewhere, is that an accused does not have a right to counsel until the "initiation of judicial criminal proceedings."

However, should this Court find that judicial criminal proceedings had been commenced, it is clear from the record (see Appendix A) that the Petitioner knowingly and intelligently waived his right to have counsel present at the pre-indictment line up and that the line up was not impermissibly suggestive under the "totality of the circumstances." *Stovall v. Denno*, 388 U.S. 293, 302 (1967).

CONCLUSION

For the foregoing reasons, Respondent, State of Tennessee, respectfully submits that the Petitioner's constitutional rights under the Fifth Amendment to the Constitution of the United States have not been violated and that, therefore, the Petition for a Writ of Certiorari heretofore filed with this Court should be denied.

Respectfully submitted,

ROBERT E. KENDRICK,
Deputy Attorney General,

WILLIAM C. KOCH, JR.,
Assistant Attorney General,
Supreme Court Building,
Nashville, Tennessee 37219,

Attorneys for Respondent.

APPENDIX A

[Tr. 94]

CLAYTON SPIERS, ALIAS
STEVE ANDERSON

VS MADISON CRIMINAL # 5

STATE OF TENNESSEE

MR. QUILLEN: I would like to have these exhibits passed to the Jury for their inspection if I may.

MR. QUILLEN: That is all I have.

Exhibits one through five passed to Jury.

MR. ROBERTS

* * *

REDIRECT EXAMINATION

BY MR. LA FON:

Q1 I will ask you this, did you view the line up?

MR. QUILLEN: If Your Honor please, I would like to ask that we take this up without the presence of the Jury at this time.

Q2 I just asked you if you viewed the line up. Is that correct?

A Yes.

Q3 I will ask you also, Mr. Quillen asked you what you said about these two and asked if you signed this paper here at that time.

MR. QUILLEN: If the Court please, I am going to have to ask this be taken up without the presence of the Jury.

THE COURT: Let's let the Jury look at these documents they have.

MR. QUILLEN: It's a matter I don't want to fore go from this that I can now ask now in other words I would like to have permission to recall him to ask him two or three additional questions about the identification of Clayton Spires Jr. but he is not here today but will be tomorrow. For that purpose I would like to.

[Tr. 95] MR. MURRAY: What is to prevent him from asking those questions now?

MR. QUILLEN: I want him to be faced with Mr. Spires Jr., then.

MR. MURRAY: This man has to get back to El Paso, Texas.

MR. QUILLEN: At this time I will formally move to the Court to recall this witness to make inquiry about the events of Clayton Spires Jr. tomorrow on which I am going to have Mr. Spires present.

MR. MURRAY: I would like to have this taken up out of the presence of the Jury. Why we should accommodate this man rather than accommodate this man.

THE COURT: We will take it up out of the presence of the Jury. Let the Jury be excused.

Q4 Mr. Roberts, Mr. Quillen asked you some questions about the line up about whether or not you had seen Clayton Spires Jr., is that correct?

A Yes.

Q5 Is that a picture of the line up that he asked you about and asked you how many people was in?

A Yes.

Q6 At that time when you identified that line up I hand you herewith a paper and ask you if on that paper April 5, 1971 at 8:25 that you wrote as number 2 Steve positive and number 4 Larry sure. Is that correct?

A Yes.

[Tr. 96] Q7 All right. Now have you ever said that Larry was positive?

A No.

Q8 You only said sure, is that correct?

A Yes.

Q9 I will ask you this. Was there some change in Larry's hair in your opinion from the time you saw him in the car and in the line up?

A Yes.

Q10 I will ask you also if you have ever at any time said that you were positive that Larry was the man? Have you ever said anything except sure?

A I have never said anything except sure. I signed this sure and I have never said anything but sure.

Q11 I ask you also if it is not true that your brother refused to be able to identify him. Is that correct?

A Pardon.

Q12 Your brother would not identify the son. Is that correct?

A Yes, that is correct.

Q13 He could not identify him, is that correct?

A He wasn't sure either whether it was him.

Q14 Now we submit that these be admissible because he asked him about the line up and he asked him
[Tr. 97] about positive and sure and about—that is your signature there on it is it not?

A Yes, it is.

Q15 And this is a picture of the line up that Mr. Quillen previously asked you about is that correct?

A Yes, it is.

THE COURT: Then it your position that both of these would be admissible to the Jury. The photograph and the statement.

MR. LA FON: Yes, sir.

MR. QUILLEN: At this time, if the Court please, I want to ask one more question or so.

RECROSS-EXAMINATION

BY MR. QUILLEN:

Q1 Did you at any time identify either Mr. Clayton Spires Sr., or Clayton Spires Jr., before you had seen this line up that was in that picture there?

A No.

Q2 Therefore if the Court please at this time I move on behalf of Clayton Spires Sr. that the testimony of this witness as to the identity of Clayton Spires Sr. be stricken in its entirety for the reason that Mr. Spires Sr. did not or was not intelligently and freely get into this line up without the services of an attorney. That he did not waive such rights that he had particularly that he was never told that it had any right to refuse to get into the line up and he did finally sign some documents to get into [Tr. 98] the line up but he did that as he will testify and I will call him as a witness in a minute that he did that because he understood from these police officers that to get into that line up was a prerequisite before he could make a bond. On that basis I wish to offer Mr. Spires to support that motion at that time. To explain what happened before he was placed in the line up and for the additional reasons that he was unlawfully—he had been arrested and on Saturday at Stewart County, Tennessee, locked up in jail in Dover, Tennessee, and brought into Madison County, being held until Monday without having been taken before any Committee Magistrate. In other words the entire proceedings was unlawful.

MR. LA FON: We have a signed document here where he waived his rights and we will be glad to introduce those to show that he was advised his rights. Is there any question Mr. Quillen to his having signed this?

MR. QUILLEN: He signed it but he did it from misunderstanding of his rights.

MR. LA FON: It is our contention that he was fully advised.

MR. QUILLEN: Let me see that. This is not all of it. There were two instruments involved which he declined to sign the others. The only thing I know to do would be to call Mr. Spires as a witness.

THE COURT: Step down Mr. Roberts.

WITNESS EXCUSED.

[Tr. 99] **MR. CLAYTON SPIRES,**

having been duly sworn, upon his examination, testified as follows:

DIRECT EXAMINATION

BY MR. QUILLEN:

Q1 Is this Mr. Clayton Spires, Sr.?

A Yes, sir.

Q2 Mr. Spires, you are the defendant in this case are you not?

A Yes, sir.

Q3 One of them. Now on a Saturday afternoon, April 4th I believe it would have been, 1971, were you arrested by some officers in Stewart County, Tennessee?

A That was April 3rd I believe.

Q4 Was that on Saturday?

A Yes, sir.

Q5 What time of day you were arrested?

A Somewhere around 4 or 5 o'clock. I don't recall just exactly.

Q6 In the afternoon?

A Yes, sir.

Q7 Who arrested you?

A Mr. Charles Crocker, Sheriff of Stewart County.

Q8 And he arrested you and your son Clayton Spires Jr. Is that correct?

A Well, my son wasn't at home. My wife and I was babysitting and my son and his wife and
[Tr. 100] little nine year old boy was at an insurance executive meeting at the Hilton.

Q9 Where was your son arrested? Do you know?

A Well, he came in and my wife told him that Mr. Crocker was there and had taken me to jail and he had told her that he had a warrant for him and he said I will just go down there and see what it is.

MR. LA FON: We object to this being immaterial when his son was arrested. This is a question of the line up here.

THE COURT: Go ahead.

Q10 After you were arrested, you were taken to the Stewart County Jail and locked up. Is that right?

A Yes, sir.

Q11 Was that immediately following the arrest?

A Yes, sir.

Q12 Were you taken before any sessions judge or other magistrate in Stewart County?

A No, sir.

Q13 How long did you remain in the Stewart County Jail?

A It was sometime in the afternoon on Sunday that the Sheriff from Jackson here, Madison County I guess it is, I don't know came down and bring me back here.

Q14 Did he bring you back to Jackson?

A Yes, sir.

[Tr. 101] Q15 What did he do with you when he got you here?

A He put me in jail, of course.

Q16 All right, did he take you before any magistrate?

A No, sir.

Q17 Now when did you first get to see some sessions judge or magistrate?

A It was on Monday, I am sure. It was on Monday that Mr. Murray came over and I believe taken me in front of——

Q18 In front of a sessions judge?

A Mr. Walker I believe it was.

Q19 Now did the police officers under take to interview you Mr. Spires?

A Yes, sir.

Q20 Do you recall their names?

A Well, one of them was—I don't know. They was just in here while ago.

Q21 Well was Mr. Moore one of them?

A Moore was one of them I think, yeah.

Q22 Now was there a Mr. Pratt?

A I believe that is what he said his name was, yes, sir.

Q23 Did they present you with some statement of rights or waiver asking you to waive your rights to have an attorney?

A Yes, they had a couple of little pieces of paper.

Q24 Did they read them to you?

A Yes, sir, they did.

Q25 All right now, the first document [Tr. 102] that was read to you about having the right to have an attorney present, did they ask you to sign it?

A Yes, sir.

Q25 Did you sign it or didn't you?

A No, I didn't sign it.

Q26 Did you tell them you wanted an attorney?

A I—Yes, I told them I didn't want to talk to them

unless my attorney was—you know, to have my attorney.

Q27 All right, you—then were you sometime later presented with another document?

A Yes, just a few minutes.

Q28 What did they tell you in connection with this second document?

A Well that was about going in front of a line up. Asked me if I would go in a line up and I told them—and they talked to me like before I could make my bond—My bond had been set but my understanding was that I had to go before this line up before that I could make bond and I said that I was willing to do that. I signed that one.

Q29 Now Mr. Spires were you ever told that you had a right to refuse to go into that line up without having an attorney there?

A No, sir, I was not.

Q30 And of course you were later put into a line up were you not?

A Yes, sir.

[Tr. 103] Q31 Along with your son.

A Yes, sir.

Q32 And some other people.

A Yes, sir.

MR. QUILLEN: That's all.

CROSS-EXAMINATION

BY MR. LA FON:

Q1 When was the bond set and—the amount of it?

A I believe it was sometime Monday.

Q2 Wasn't it Monday morning to refresh your memory?

A Sometime—I guess it was before noon.

Q3 Monday morning?

A I don't know just what time it was.

Q4 Well it was April 5th wasn't it?

A Well let's see I guess it was.

Q5 All right, let me ask you this. Didn't they read you this statement here. "Before we ask you any questions we want you to understand your rights. You have a right to remain silent. Anything you say can and will be used against you in a court of law. You have a right to talk to a lawyer and have him present with you while you are being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before we question you, if you wish one. If you wish to answer questions now, without a lawyer present, you have the right to stop answering questions at any time." Now did they read that to you?

A Well something to that effect. I don't [Tr. 104] recall what the words——

Q6 I will ask you if you didn't sign this particular statement here. "Dated 4-5-71—Having been advised of my rights and realizing that I have the right to have an attorney present during the entire proceedings, I waive my right to have an attorney present during this line up that I am to be a part of." Isn't that your signature?

A That is my signature but the one they read me they went back and brought this back later.

Q7 Now this——

A This wasn't—they had a little piece of note paper.

Q8 Did you sign this?

A I signed this yes.

Q9 Did you read it?

A Yes.

Q10 Doesn't that say there Mr. Spires as plain as day—get your glasses out if you will please, sir. "Having been advised of my rights and realizing that I have the right to have an attorney present during the entire proceedings, I waive my right to have an attorney present during this line

up that I am to be a part of." Now that is correct isn't it?

A That's right.

Q11 And you signed it didn't you?

A Yes, I signed it. That is my signature.

Q12 How long was it after your bond had [Tr. 105] already been set before you went into this line up?

A I was in the line up sometime that afternoon, around 4 or 4:30 something like that.

Q13 How long, 30 minutes, an hour, two hours?

A I imagine it was two or three hours.

Q14 And you knew your bond was already set wasn't it?

A Yes, sir.

Q15 What amount was it set in?

A Ten thousand.

Q16 And you made bond didn't you?

A Yeah after I went through the line up yes.

Q17 And you made bond in the amount of $10,000.00 is that right?

A Yes, sir.

Q18 If Your Honor please may I see this. This line up that you are speaking of, is this a picture of it?

A Yes, sir.

Q19 Does that show you there?

A Yes.

Q20 You are number two aren't you?

A Yes, sir.

Q21 And your son is number four.

A Yes, sir.

Q22 This is the line up that was made after you signed this statement saying that you waived your right to a lawyer. Is that correct?

[Tr. 106] A Best I remember yes.

Q23 Well now with the exception of you saying they said something about making your bond was any other threats or anything like that made to you to get you in that line up?

A They just told me the quicker I went through the line up, the quicker I could make bond. That was all.

Q24 Well who told you that?

A One of the officers.

Q25 Did you tell Ray Pratt here that you knew what you were doing and you knew your rights and he didn't have to read them to you. Did you tell him that?

A No, I don't recall it.

Q26 Well you did know that you had a right to remain silent didn't you? You have had some other experience haven't you?

A I——

Q27 Didn't you know that you had a right to remain silent?

A No, I don't know that much about law sir.

Q28 Well——

A As I said before I only have about a third grade education. Fifth.

MR. QUILLEN: May I have the other document that he declined to sign.

MR. LA FON: Yes.

MR. QUILLEN: Do you have any objections to making that a part of the record?

MR. LA FON: If Your Honor please, we
[Tr. 107] submit that even though he refused to sign this waiver he still waivered it as long as he has been advised of his rights. It is not necessary for him to sign a waiver.

MR. QUILLEN: If Your Honor please, it is our position

that they got the client to sign it indicating apparently that he would be allowed bond. He never publically had an opportunity to get an attorney.

(Accordingly, said rights, having been duly marked and filed exhibits 6 and 7, will be found attached hereto.)

THE COURT: You can step down Mr. Spires.

MR. QUILLEN: I understand you requested the rule. He has been here in the Court Room through out the proceedings this far.

MR. LA FON: If Your Honor please he is not going to testify. We feel like he has a right to be used as rebuttal witness in regard to this line up. That is the only purpose.

MR. QUILLEN: This is a material witness.

MR. LA FON: We are not going to use him.

THE COURT: Overruled.

MR. QUILLEN: Note and exception.

WITNESS EXCUSED.

DATE: 4-5-71

Having been advised of my rights and realizing that I have the right to have an attorney present during the entire proceedings, I waive my right to have my attorney present during this line-up that I am to be a part of.

Clayton A. Spires Sr

WITNESS: Roy N. Pratt

WITNESS: R. D. Moore

JACKSON POLICE DEPARTMENT — JACKSON, TENNESSEE

YOUR RIGHTS

Place Detective Bureau

Date 4-5-71

Time 5:53 PM

Before we ask you any questions, we want you to understand your rights.

You have the right to remain silent.

Anything you say can and will be used against you in a court of law.

You have the right to talk to a lawyer and have him present with you while you are being questioned.

If you cannot afford to hire a lawyer, one will be appointed to represent you before we question you, if you wish one.

If you wish to answer questions now, without a lawyer present, you have the right to stop answering questions at any time.

WAIVER

I have read the statement of my rights shown above. I understand my rights. I am willing to answer questions and make a statement. I do not want a lawyer. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me.

Signed refused to sign Clayton Speed, Jr.

Witness Roy H. Pruett

Witness Det. J. R. Moore

Time 5:53 PM

[Tr. 110] **LT. RAY PRATT,**

having been duly sworn, upon his examination, testified as follows:

DIRECT EXAMINATION

BY MR. LA FON

Q1 Lt. Pratt were you one of the investigating officers who was contacted and assisted in the investigation of this alleged crime that took place on April 3, 1971 out around the Ramada Inn?

A Yes, sir.

Q2 Was the defendant Clayton Spires investigated and did you come in contact with him and talk to him about this matter? Clayton Spires Sr.?

A Yes, I did.

Q3 Did you read him his rights sheet that you have here?

A Yes, sir.

Q4 The one that Mr. Quillen asked to be introduced as Exhibit 7. I will ask you to refer to that and state whether or not at that time—what did he tell you after you had read it to him? What did he say?

A He stated that he understood his rights. That he did not want a lawyer present at that time and that he understood his rights.

Q5 What about signing anything?

A He stated that he had rather not sign anything but he understood his rights.

[Tr. 111] Q6 How much later was it before he was asked if he would be willing to waive his rights to go in a line up?

A I don't know the exact time. It wasn't too long.

Q7 Did he sign that Lt.?

A Yes, sir. This was read to him. He read it. Said he understood it and that he had no objections whatsoever to being in a line up.

Q8 Was he ever at anytime told that he would have to do that before he made bond?

A No, sir.

Q9 Who else was present at that time, Jackie Moore?

A Sgt. Moore.

Q10 Look at that picure Ray. Is that the same picture that was taken in the line up there?

A Yes, sir.

Q11 At that time were these two marks there of Fred Roberts and the other one is sure. Is that correct? Were you present when he signed that?

A Yes, sir, I was.

MR. LA FON: That's all.

CROSS-EXAMINATION

BY MR. QUILLEN:

Q1 I will ask you if—when did you first start undertaking to interview Mr. Spires?

A I would have to refer to some type of case files outside. Oh, you mean the interview with Mr. Spires?

Q2 Yes, sir.

[Tr. 112] A 5:53 PM on 4-5-71.

Q3 Was that the first time you had seen him that day?

A Yes, sir, as I recall that was the first time I saw him.

Q4 How did you fix that hour?

A It is here on the rights.

Q5 Hadn't there been anyone undertaking to interview him before that time?

A It is a very short period from the time we start

our interviews, this is the first thing we do. We explain their rights to them.

Q6 All right. He declined to sign that one.

A He declined to sign the waiver part of it. There is a waiver at the bottom.

Q7 Did you understand by that that he didn't want to waive any rights?

A He stated he didn't want a lawyer present at that time but he didn't want to give us a statement of any kind and we didn't ask him any questions then.

Q8 Now, was Mr. Moore present at the time this matter was being discussed with Mr. Spires about this waiver?

A Yes, sir.

Q9 Did you—were you and he present at all times together with Mr. Spires?

A I couldn't say definitely if we were present at all times. We were present when both of these documents were read.

Q10 And Mr. Moore told him though that [Tr. 113] with respect to a bond you don't know do you?

A No, sir, I don't know.

Q11 Now——

A I didn't tell him that.

Q12 You testified a little earlier that no one did.

A I will correct that. I didn't tell him that and Mr. Moore didn't do it in my presence.

Q13 There was no discussion at all with him about a bond in your presence?

A I don't recall discussing it with Mr. Spires, about a bond.

Q14 Did you continue trying to interrogate him after he declined to sign the first paper?

A No, sir.

Q15 These other people in that photograph are all police officers except for Mr. Spires Sr. and his son. Is that correct?

A I believe so. There might be one that is not. The rest of them are. If I might elaborate on that we were having a school at that time. These people were over at the school and that is how we got our line up.

Q16 Were most of them from out of town, outside of Jackson?

A Some of them were from out of town, yes, sir. We have on the case file, generally there is a list of the names and addresses and everything.

Q17 You were the officer in charge. You [Tr. 114] out ranked Sgt. Moore. Is that correct?

A Yes, sir.

Q18 You were in charge of this case. Is that right?

A Yes, sir.

MR. QUILLEN: That's all.

WITNESS EXCUSED.

SGT. JACKIE MOORE,

having been duly sworn, upon his examination, testified as follows:

DIRECT EXAMINATION

BY MR. LA FON:

Q1 Is this Jackie Moore and are you a member of the Jackson Police Department?

A Yes.

Q2 Were you working with Ray Pratt in an investigation of the theft of money from Mr. Roberts here, Fred Roberts?

A Yes, sir, that is correct.

Q3 While in the process of the investigation, did y'all come across Clayton Spiers Sr. and were you present at the time when there was some conversation with him regarding his rights?

A Yes, sir, I was.

Q4 Let me ask you first, look at the Exhibit 7 here and ask you if this was read to him and if he refused to sign the waiver itself. Is that correct?

A He did.

Q5 Did he make any statement as to whether or not he knew his rights?

A Yes, sir, we always——

[Tr. 115] Q7 What did he say about it?

A He stated that he understood his rights.

Q8 Did he make any other statement why he didn't want to sign?

A Just stated that he didn't want to sign.

Q9 Let me ask you this. At some time later than that did he sign this statement here in regard to appearing in the line up?

A He did.

Q10 Was that done freely and voluntarily?

A Yes, sir, it was.

Q11 Were any threats made to this man, or anything of this sort in order to obtain that signature?

A No, sir, there were not.

Q12 In your presence or did you say anything to him in regard to the fact that it would have some effect on him as to when his bond would be made?

A I have no recollection of anything.

Q13 Did you tell him that he would have to do that before he could make his bond.

A No, sir.

Q14 Did you hear anyone say that?

A No, sir.

Q15 Now the line up that we are speaking of, I ask you to refer to this picture and ask you to examine that and state if it is the line up?

A It is.

[Tr. 116] Q16 That consisted of some police officers from here in Jackson and also some out of town people.

A It does.

MR. LA FON: No further questions.

CROSS-EXAMINATION

BY MR. QUILLEN:

Q1 Mr. Moore, when was it that you first presented some of these documents to Mr. Spires for his signature. Do you know what time it was?

A At 5:53 P.M. 5th of April, 1971.

Q2 That was the first waiver of rights that he refused to sign. Is that right?

A Yes, sir, that is correct.

Q3 How long was it after that until you presented him with another document about this line up?

A I don't recall the exact time. It would have been some time after that because this is not a standard form. It would have taken some time to type it. Several minutes probably.

Q4 Does that mean — There is nothing in that second form indicating that he had any right to refuse to get in that line up is there?

A There is not.

Q5 Now was he advised that he had a right to refuse to get into the line up?

A I don't recall having advised him of that. This

[Tr. 117] is the waiver that we explained to him.

Q6 Now, do you recall what time the line up was finally conducted?

A It would have been approximately 8 PM.

Q7 And that was how long in terms of hours and minutes after he declined to sign the first document?

A Approximately two hours.

Q8 There is no notation that you have anywhere as to when it was he finally signed the other one is there?

A No, sir, not the signature of the second document.

Q9 Now, I will ask you if Mr. Spires was not discussing with you at the time he signed that second document the possibility of making a bond?

A Yes, sir, he was.

Q10 And you had gone ahead and just told this defendant that you were going to hold the line up. Is that true?

A Yes, sir.

Q11 What did he say to you about making a bond?

A I don't recall.

Q12 Wasn't it generally speaking to him that this line up would have to be conducted before he could be released on bond?

A We don't state things in general.

Q13 Wasn't that the import of what you were telling him? Wasn't that the reasonable meaning of it?

[Tr. 118] A No, sir, it wasn't.

Q14 I will ask you if during the prior trial of this matter you were asked this question. "Was he told that he had the right to decline to stand in that line up?" Answer, "He was advised that we would hold the line up and we asked him if he would stand in the line up. He was also advised that he had the right to have an attorney present." Do you recall that question and that answer?

A I don't recall it but I presume that I made such a testimony.

Q15 All right, the next question, "During the line up?" Answer, "During the time that he would stand in the line up, if he so desired, he declined stating that his desire was to get this over as quickly as possibly that he was ready to stand in the line up right now. Getting it over with as quickly as possible so that he could make bond." Do you recall that answer?

A The answer would be the same as the last question Mr. Quillen. I don't exactly remember my testimony but reading from the transcript, I would suppose this is what I did say, yes, sir.

Q16 From that statement then it is reasonable to assume that he understood he was going to have to get in that line up before he could make bond.

MR. LA FON: Objection.

THE COURT: Sustained.

MR. QUILLEN: That's all.

[Tr. 119] MR. LA FON: One other thing if Your Honor please. On the exhibit there this shows that bond was not made until the next day after the line up. It wouldn't be made that night. Call that to the Court's attention.

WITNESS EXCUSED.

MR. LA FON: It was made at 2:00 o'clock on the following day after the line up that night. That is when the bond was made. That is part of the exhibit that Mr. Quillen asked to be made an exhibit.

MR. QUILLEN: I have one further question to ask Mr. Spires.

MR. CLAYTON SPIRES,

having been duly sworn, resumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. QUILLEN:

Q1 Mr. Spires, were you told by any police officer before you got into that line up when you could make a bond if you got in it?

A They told me immediately after the line up I could go home that night. I could go home and make bond that night. I didn't make bond until the next day.

Q2 Do you recall which one of these officers said that to you?

A Well I think they were both present. I [Tr. 120] don't recall just which one.

Q3 Anyway you were not able then to make a bond until the next day.

A To the next day, that's right.

Q4 Do you know why you couldn't make that bond until the next day?

A No, I don't know why. My wife and them came over here but I don't know why I couldn't.

Q5 You had securities to make the bond that night, is that right?

A Yes, sir.

MR. QUILLEN: That's all.

CROSS-EXAMINATION

BY MR. LA FON:

Q1 What about the next morning? At 8, 9, 10 or 11 o'clock?

A That's when my wife was over.

Q2 That's the next morning though.

A That's right.

Q3 After your wife arrived the next day that is when you made the bond wasn't it. When you were able to contact the local insurance company and get a surety bond.

A Yes, but the day before I had some people here from the insurance company.

[Tr. 121] Q4 Yes, but didn't you have to get a mortgage placed on your home up there and run a lot of red tape before they would make your bond?

A No, I done that after I was out.

Q5 Are you saying now this man told you you couldn't make a bond that night?

A My understanding——

Q6 Did he tell you that he couldn't make a bond until you got into the line up?

A He told me the quicker I would get in the line up and get this over with the quicker I could make bond and go home.

Q7 Did you try to make it immediately afterwards?

A I done all I could do. I was up in jail.

Q8 I know but what did you do to make the bond that night?

A Well I couldn't get no call out. I wanted to call home. I couldn't get no call out.

Q9 That has nothing to do. You called the next morning and that is when they come down here wasn't it?

A The next morning my wife was down here but that evening there was some men here that would have made my bond with the Combined Insurance Company.

Q10 Do you have those people here to testify to that?

A No, but I had them here one time.

Q11 Were you refused to make your bond that day?

A No, sir.

Q12 Nobody refused at anytime for anybody [Tr. 122] to make your bond except on the Monday morning. That is true isn't it?

A I don't know I didn't get to talk to anybody. I was put back in jail after I went through the line up.

Q13 Do you have anybody now that is here to testify that anybody refused to take your bond once it was set on the Monday morning before the line up that night?

A I didn't understand the question.

Q14 Have you got anybody here that were refused to make the bond?

A That were refused?

Q15 Yes.

A No ain't nobody here that said that they were refused.

Q16 They could have paid the bond on Monday morning if you had somebody here couldn't they?

A I don't know.

MR. LA FON: That's all.

WITNESS EXCUSED.

RAY PRATT,

having been duly sworn, resumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. LA FON:

Q1 Mr. Pratt, did you ever at any time tell or do anything as far as you know that indicated that the making of the bond depended on the line up?

A No, sir.

[Tr. 123] MR. LA FON: That's all.

WITNESS EXCUSED.

MR. QUILLEN: That is all we have to support our motion strike the questioned testimony.

THE COURT: Let the motion be overruled.

MR. QUILLEN: Note of exception.

MR. LA FON: One other thing if Your Honor please, what about at least the notation that says that as far as at the time Mr. Roberts wrote down positive on Clayton Spires Sr. and sure on Larry.

THE COURT: You were about to offer that when the Jury was excluded that the Court is going to allow that to be introduced since that matter has been brought up by the defendant himself.

MR. QUILLEN: The only thing that I wanted permission to do was to recall this witness in the morning at which time I expect I will have Clayton Spires Jr. present so that he may be confronted with Mr. Spires Jr. to tell us whether or not he is the man that was previously identified.

MR. MURRAY: The state will stipulate that.

THE COURT: Well then we won't have any problems then.

THE COURT: Call the Jury in please.

[Tr. 124] **FRED ROBERTS,**

having been duly sworn, resumed the stand and testified as follows:

DIRECT EXAMINATION

BY MR. LA FON:

Q1 Mr. Roberts there has been some question about the fact that you saw Mr. Clayton Spires Sr. viewed in the line up and later on you testified at a Preliminary Hearing

here in Madison County. I will ask you at the time of the line up did you both see Clayton Spires Sr. and Clayton Spires Jr. in the line up?

A I did, yes.

Q2 I hand you a paper and ask you if that is dated April 5, 1971 at 8:25 P.M. Is that correct?

A Yes it is correct.

Q3 And number two in the line up Steve. I will ask you to state whether or not that is Clayton Spires Sr.?

A Yes.

Q4 What did you write with regard to Clayton Spires Sr.?

A Positive identification.

Q5 Number four, his son, what did you write?

A Sure.

Q6 Did you sign that?

A I did.

Q7 Is there any question at all in your mind as to the identification of Clayton Spires Sr. being the [Tr. 125] man that was with the driver in this Lincoln Continental?

A No question in my mind at all. I am absolutely positive.

Q8 You are absolutely positive about that.

A Yes.

Q9 Maybe there is a difference between positive and sure. What is the difference as far as the son is concerned in the line up and in the car. Do you see some difference in the two men?

A As I previously said there was a difference in the hair primarily.

Q10 A change or hair style and amount of hair?

A Style and color and amount of hair.

Q11 Is that what gives you trouble as far as making

a positive identification of Clayton Spires Jr., is that right?

A Yes.

Q12 Has there ever been any question about Senior in your mind?

A No question in my mind at all.

Q13 Let me ask you this, on this Clayton Spires Jr. who you identified in the line up as being sure you said something about his hair, I will ask you if there was any possibility of a wig being involved as far as his hair is concerned?

* * *

THE STATE OF TENNESSEE

I, JEWEL REDDEN, Clerk of the Court of Criminal Appeals of said State for the Western Division thereof, at Jackson, do hereby certify that the foregoing is a true, perfect and complete copy of the PAGE 94 THROUGH 125 VOLUME II BILL OF EXCEPTIONS pronounced by said Court at its October Term, 19 72, in the case of CLAYTON SPIERS, ALIAS STEVE ANDERSON against STATE OF TENNESSEE as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court at office, in the City of Jackson, on this, the 26th day of JULY A.D., 19 73

/s/ Jewel Redden ,Clerk,

By . . . . . .